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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 30.

THE NATIONAL CITY BANK OF NEW YORK,

Petitioner,

v.

THE REPUBLIC OF CHINA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION OF RESPONDENT FOR REHEARING.

CLETUS KEATING,
ROBERT E. KLINE, JR.,
LOUIS J. GUSMANO,
Counsel for Respondent
The Republic of China.

KIRLIN, CAMPBELL & KEATING,
Of Counsel.

March 31, 1955.

Pandick Press, Inc., 22 Thomas St., New York 6, N. Y., U. S. A.

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Respondent, the National Government of The Republic of China, respectfully presents this, its petition for rehearing in the above entitled cause, and in support thereof presents the following:

INTRODUCTION.

Respondent is a plaintiff in this suit brought in the United States District Court, Southern District of New York against defendant The National City Bank of New York to recover a $200,000 deposit account. In its answer, defendant pleaded two counterclaims, based on allegedly

matured Treasury Notes of The Republic of China, amounting to $1,634,432. The dismissal on motion of the counterclaims by the District Court was unanimously affirmed by the Court of Appeals for the Second Circuit on the ground that the counterclaims were not based upon the subject matter of the main suit and, therefore, could not be litigated against the plea of sovereign immunity by The Republic of China (R. 64-72). Defendant's petition for certiorari was granted by order of this Court filed April 26, 1954 (R. 73). Thereafter, briefs having been filed by both parties, oral argument was heard by this Court on November 9, 1954. On March 7, 1955, this Court rendered a four to three decision reversing the judgment of the Court of Appeals and remanding the case to the District Court with directions to reinstate the counterclaims.

Mr. Justice Frankfurter wrote the majority opinion, joined by Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Minton; Mr. Justice Reed dissented, joined by Mr. Justice Burton and Mr. Justice Clark.

At the time of argument and at the time the decision was rendered there existed a vacancy on the Court. This vacancy has since been filled by Mr. Justice Harlan.

Mr. Justice Douglas, who participated in the consideration and decision on the application for certiorari and who heard the oral argument of the parties after certiorari was granted, took no part in the consideration or the decision of the case.

Grounds for Rehearing.

1. Although the Court agreed that the counterclaims, since they are connected with the sovereign's fiscal management, fall within the category of immune operations of a foreign government as defined by the State Department's

1952 pronouncement, yet it felt that this could not be considered because the State Department neither has been asked nor has it given the slightest intimation that in its judgment allowance of counterclaims in such a situation would embarrass friendly relations with The Republic of China. While The Republic of China had heretofore considered it inappropriate to submit a note to the State Department, it has now been constrained, pursuant to the Court's suggestion, to do so. Because of The Republic of China's grave concern that the allowance of the counterclaims will seriously jeopardize its financial transactions in the United States and embarrass the mutual interests of the respective governments, it has instructed its Ambassador to present a note to the State Department, which note has now been formally presented, wherein the position of The Republic of China is stated with the request that the State Department transmit it through regular channels to this Honorable Court, together with such suggestion thereon as the State Department may deem it appropriate to make.

2. The decision of the Court, if allowed to stand, will adversely affect not only the normal and necessary financial dealings of The Republic of China in the United States, but also those of all other nations who will find themselves faced with the dilemma of having transferred funds to or established credits in this country for specific governmental purposes, the payment of which, contrary to all previous decisions on the subject, can now be avoided by the offsetting of governmental obligations acquired at par or at a substantial discount. The Chinese accounts in this country which will be adversely affected by this decision are large and varied. It will affect not only direct accounts of The Republic of China, but also all accounts of its representatives and agencies, including such accounts as branches of the armed

forces, procurement missions, governmental departments and bureaus. It follows that the decision of the Court will seriously hamper the National Government of The Republic of China in the ordinary course of its governmental operations and will serve to frustrate the established policy of the United States to accord economic and other aid to the National Government of The Republic of China. The decision will also act as a deterrent to foreign countries from opening credits in the United States, which can now be vitiated by offsetting bonds or other obligations of the foreign country purchased at par or at substantial discounts. It is respectfully submitted that the decision of the Court should be reappraised in the light of these sweeping consequences.

3. Since the decision sanctions the allowance of a suit by counterclaim against a sovereign in courts outside of its own territorial limits, it opens the door to foreign courts holding the United States subject to counterclaims even on sovereign obligations, *jure imperii* in form. The decision thus contravenes the clear intention of the Congress of the United States (28 U. S. C. §2406) that the United States be subject to counterclaims or set-offs only in United States Courts and only after required administrative procedure in the General Accounting Office has been complied with.

4. The majority opinion, in arriving at the conclusion that a foreign sovereign is suable by counterclaim in the United States, relies upon a "steady legislative trend" of United States statutes, and cases interpreting those statutes, by which the United States has affirmatively consented to suit in the United States. But the point here involved is the suability of a sovereign outside of its own territory. There is no legislative trend by which the United

States has consented to suit, either directly or by counterclaim, outside of its territorial confines; nor is there any legislation even intimating that a foreign sovereign should be subjected to suit, either directly or by counterclaim, outside of its territorial confines and in the United States. The only legislative trend dealing with a foreign sovereign's immunity is found in 22 U. S. C. §288a (b). This statute enacted in 1945 nowise limits the concept of foreign sovereign immunity, but rather accepts it and expands it so as to apply to international organizations. The statute provides: "International organizations, their property and their assets, wherever located, and by whomsoever held, shall enjoy the same immunity from suit and every form of judicial process as is enjoyed by foreign governments, except to the extent that such organizations may expressly waive their immunity for the purpose of any proceedings or by the terms of any contract."

5. The Court bases its decision upon Chinese internal law which is stated as permitting suits against the Chinese Government in its own courts on contract claims, including Treasury Notes such as are the subject of the counterclaims. We respectfully submit that the Chinese law is not correctly stated in the opinion. It is true that under Chinese law relief may be obtained against the Chinese Government in certain circumstances by one deemed aggrieved as a result of governmental action However, since such grievances are based on public law and not civil law, they cannot be pursued, whether by a Chinese citizen or an American citizen, in the ordinary civil courts of China. Rather, the internal Chinese law governing administrative claims applies. This requires that a petition for relief be filed with the cognizant governmental agency, following prescribed procedure and within a

definite time limitation. If the claim is denied, an administrative appeal must be filed and rejected before it can be entertained by a special administrative court organized for that purpose. Judicial Yuan Interpretation No. 373, relied upon by the Court, was promulgated as a supplement to Judicial Yuan Interpretation No. 107; these two interpretations establish that in cases not involving ordinary contract claims, but relating to the sphere of governmental activities, no one can sue the Chinese Government in its ordinary civil courts. The Treasury Notes which form the basis of the counterclaims clearly are within the sphere of governmental activities, and The Republic of China is not suable thereon in its ordinary civil courts; the noteholder must pursue the prescribed administrative process. Thus, while defendant may be entitled to special relief under Chinese law and consequently no irresponsible situation is created by allowing in this case the plea of sovereign immunity, yet the position and rights of the defendant should not be better than the position and rights of Chinese citizens in Chinese courts.* A contrary view would result in circumventing the prescribed Chinese law controlling governmental claims and would result in nullifying the requirement making the right to resort to its special administrative court dependent upon compliance with the conditions precedent prescribed by its law. Just as defendant could not have instituted a suit or filed its counterclaims against the Chinese Government in a Chinese civil court, so it should not be able to institute suit or file its counterclaims against the Chinese Government in a corresponding American court.

6. Both the majority and minority opinions recognize the fundamental importance of the question of international

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* Treaty of Nov. 4, 1946, Art. VI, §4, 63 Stat. 1305.

law which the case presents. Although it had never before been directly passed upon by this Court, it has been considered in numerous decisions of lower federal courts and in England (see footnote 6 of the majority opinion and footnotes 6 and 7 of the dissenting opinion), but none have reached the result taken by the Court in this case. Whereas ordinarily a decision by only four members of the Court would not result in reversing a judgment of a Court of Appeals, yet in the instant case, because of the vacancy which had existed and because of Mr. Justice Douglas not taking part in the consideration of the case, the decision by four members of the Court has resulted not only in the reversal of the judgment of the Court of Appeals, but also in the overturning of what has been considered a well-settled principle limiting counterclaims against a sovereign to those based on the subject matter of the main suit. The vacancy, however, has since been filled and the granting of rehearing will enable Mr. Justice Harlan to take part in the decision. It may also be that on rehearing Mr. Justice Douglas will take part in the decision. While, of course, it is recognized that a four to three decision until overruled is binding as a decision of the Court, yet it must be considered that since the decision has not been concurred in by a majority of the full Court, it is open to future repudiation by those Justices who did not take part joining with the present minority*; and it is probable, until a majority of the full Court has expressed itself on the question, that it will sooner or later come again before the Court

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* *Cf. Hust* v. *Moore-McCormack Line*, 328 U. S. 707, a four to three decision in which Chief Justice Vinson and Mr. Justice Jackson did not participate, although several years later they combined with the dissenters and overruled the decision in *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U. S. 783. See also the concurring opinion of Mr. Justice Frankfurter in *Kovacs* v. *Cooper*, 336 U. S. 77, 89, rejecting "a single decision by a closely divided court" although decided just a few months prior thereto.

for its further consideration. It is respectfully submitted that a question of such international importance as is here involved should not be finally decided contrary to all prior precedent by less than a majority of a full Court, particularly where the full Court as it is now constituted has not had occasion to take part in the consideration and decision of the case.

WHEREFORE, it is respectfully prayed that the petition for a rehearing be granted and that the judgment of the Court of Appeals for the Second Circuit be, upon further consideration, affirmed or, in the alternative, that a reasonable time be granted to file a supplemental petition for rehearing pending the transmittal to this Honorable Court by the State Department of such suggestion as it may deem appropriate.

Respectfully submitted,

CLETUS KEATING,
ROBERT E. KLINE, JR.,
LOUIS J. GUSMANO,
Counsel for Respondent,
The Republic of China.

KIRLIN, CAMPBELL & KEATING,
Of Counsel.

March 31, 1955.

I, Louis J. Gusmano, counsel for the above-named respondent, do hereby certify that the foregoing petition for the rehearing of this cause is presented in good faith and not for delay.

Louis J. Gusmano,
Counsel for Respondent.